



BILLING: 8070-01-P

FEDERAL HOUSING FINANCE BOARD

12 CFR Part 911

FEDERAL HOUSING FINANCE AGENCY

12 CFR Part 1214

RIN 2590-AA06

Availability of Non-Public Information

AGENCIES: Federal Housing Finance Board; Federal Housing Finance Agency.

ACTION: Final Rule.

SUMMARY: The Federal Housing Finance Agency (FHFA or Agency) is issuing a final rule governing the disclosure of FHFA non-public information. The final rule replaces rules issued by FHFA's predecessor agencies the Federal Housing Finance Board (Finance Board) and the Office of Federal Housing Enterprise Oversight (OFHEO). The final rule prohibits the unauthorized disclosure of FHFA non-public information, replaces the Finance Board's rule on the Availability of Unpublished Information, and parallels those portions of OFHEO's former rule on non-public information that were not replaced by FHFA's Freedom of Information Act regulation.

DATES: The effective date of this regulation is: [INSERT DATE 30 DAYS AFTER DATE OF PUBLICATION IN THE FEDERAL REGISTER.]

FOR FURTHER INFORMATION CONTACT: James P. Jordan, Senior Counsel, 202-649-3075 (not a toll-free number), Federal Housing Finance Agency, Constitution Center, 400 Seventh Street, SW, Eighth Floor, Washington, DC 20024. The telephone

number for the Telecommunications Device for the Hearing Impaired is 800–877–8339.

SUPPLEMENTARY INFORMATION:

I. Background

Establishment of FHFA

Effective July 30, 2008, the Housing and Economic Recovery Act of 2008 (Public Law 110-289, 122 Stat. 2654) (HERA), amended the Federal Housing Enterprises Financial Safety and Soundness Act of 1992 (12 U.S.C. 4501 et seq.) (Safety and Soundness Act), and the Federal Home Loan Bank Act (12 U.S.C. 1421–1449) to establish FHFA as an independent regulatory agency of the Federal Government. FHFA was established with all of the authorities necessary to supervise and regulate the Federal National Mortgage Association, the Federal Home Loan Mortgage Corporation, the Federal Home Loan Banks (collectively, regulated entities), and the Office of Finance of the Federal Home Loan Bank System (Office of Finance).

HERA transferred to FHFA the employees, functions, and regulations of OFHEO, the Finance Board, and the Government-Sponsored Enterprise mission team within the U.S. Department of Housing and Urban Development. FHFA is responsible for ensuring that the regulated entities operate in a safe and sound manner, including maintaining adequate capital and internal controls; foster liquid, efficient, competitive, and resilient national housing finance markets; comply with the Safety and Soundness Act and their respective authorizing statutes, as well as all rules, regulations, guidelines, and orders issued under law; and carry out their missions through activities that are authorized by law and are consistent with the public interest. In addition, FHFA may prescribe regulations as determined to be appropriate regarding the conduct of conservatorships or receiverships.

The FHFA published a proposed regulation on the Availability of Non-Public Information for public comment in the Federal Register, 78 FR 6042 (January 29, 2013). No comments were received. Accordingly, the proposed regulation is adopted as a final regulation with only minor editorial changes.

II. Analysis of Rule

The Safety and Soundness Act mandates that FHFA issue regulations in connection with FHFA's supervision and regulation of the regulated entities and the Office of Finance. The final rule updates, clarifies, and simplifies existing regulations and eliminates redundant provisions. It reduces confusion about the applicability of predecessor agencies' rules.

The final rule prohibits the unauthorized disclosure of FHFA non-public information, replace the Finance Board's rule on the Availability of Unpublished Information at 12 CFR part 911, and parallel those portions of OFHEO's former rule on non-public information that were not replaced by FHFA's Freedom of Information Act regulation at 12 CFR part 1202. The final rule does not affect 12 CFR 1703 Subparts E – F. As described below, FHFA is issuing a separate rule to replace those subparts.

The final rule §§ 1214.3 and 1214.4 are substantively analogous to the former 12 CFR §§ 1703.6 to 1703.8 and to the existing 12 CFR 911.3, which the final rule replaces. The final FHFA rule (12 CFR part 1214), the former OFHEO rule (12 CFR part 1703), and the existing Finance Board rule (12 CFR part 911), all generally prohibit disclosure of non-public agency information to parties that are not agency employees, and set forth the limited circumstances when disclosure is permitted. The Finance Board rule, 12 CFR part 911, also outlines how the Finance Board handled demands and requests for

information in the context of legal proceedings. Today, FHFA also sent to be published in this issue of the Federal Register a final rule on “Production of FHFA Records, Information, and Employee Testimony in Third-Party Legal Proceedings (“Touhy”) which sets forth FHFA’s process for handling those demands and requests.

Use of the Term “Confidential”

The final rule would define “confidential supervisory information,” to be included as a subset of “non-public information.” The inclusion of the term “confidential” within the definition of “confidential supervisory information” is not intended to invoke the meaning of “confidential,” as that term is used in Executive Order 13526, Classified National Security Information, December 29, 2009. Confidential supervisory information is used in part 1214 to refer to the distinct category of information defined in final § 1214.1. FHFA used the word “confidential” within the label for this category of information simply to be consistent with the manner in which federal banking agencies refer to similar or identical types of information.

REGULATORY IMPACTS

Paperwork Reduction Act

The final rule does not contain any information collection requirement that requires the approval of the Office of Management and Budget under the Paperwork Reduction Act (44 U.S.C. 3501 et seq.).

Regulatory Flexibility Act and Executive Order 13272—Consideration of Small Entities

FHFA has considered the final rule’s impact under the Regulatory Flexibility Act (5 U.S.C. 602 et seq.) and Executive Order 13272 of August 13, 2002. The final rule, is not likely to have a significant economic impact on a substantial number of small entities

under the Regulatory Flexibility Act and Executive Order 13272, because it will not: (1) impose record-keeping requirements on them; (2) affect their competitive position in relation to large entities; and (3) affect their cash flow, liquidity or ability to remain in the market. (5 U.S.C. 605(b)).

List of Subjects

12 CFR Part 911

Credit, Federal home loan banks, Reporting and recordkeeping requirements.

12 CFR Part 1214

Administrative practice and procedure, Confidential commercial information, Disclosure, Exemptions, Government employees, Records.

Accordingly, for the reasons set forth in the **Supplementary Information**, and under the authority of 12 U.S.C. 4526, FHFA hereby amends chapters IX and XII of title 12 of the Code of Federal Regulations as follows:

Chapter IX—Federal Housing Finance Board

PART 911—[REMOVED]

1. Remove part 911.

Chapter XII—Federal Housing Finance Agency

2. Add part 1214 to read as follows:

PART 1214—AVAILABILITY OF NON-PUBLIC INFORMATION

Sec.

1214.1 Definitions.

1214.2 Purpose and scope.

1214.3 General rule.

1214.4 Exceptions.

Authority: 5 U.S.C. 301, 552; 12 U.S.C. 4501, 4513, 4522, 4526, 4639.

§ 1214.1 Definitions.

Confidential supervisory information means information prepared or received by FHFA that meets all of the following criteria:

(1) The information is not a document prepared by a regulated entity or the Office of Finance for its own business purposes that is in its possession;

(2) The information is exempt from the Freedom of Information Act, 5 U.S.C. 552 (1966); and

(3) The information—(i) Consists of reports of examination, inspection and visitation, confidential operating and condition reports, and any information derived from, related to, or contained in such reports, or

(ii) Is gathered by FHFA in the course of any investigation, suspicious activity report, cease-and-desist order, civil money penalty enforcement order, suspension, removal or prohibition order, or other supervisory or enforcement orders or actions taken under the Federal Housing Enterprises Financial Safety and Soundness Act of 1992, Public Law 102-550, 122 Stat. 2654.

Disclosure means release or divulgence of information by any person to a person outside of FHFA.

FHFA employee means strictly for the purpose of this regulation, any person employed by FHFA, including any current or former officer, intern, agent, contractor or contractor personnel, or detailee of FHFA, and any person employed by the FHFA Office of the Inspector General (FHFA-OIG), including any current or former officer, intern, agent, contractor or contractor personnel, or detailee of FHFA-OIG.

Non-public information means information that FHFA has not made public that is

created by, obtained by, or communicated to an FHFA employee in connection with the performance of official duties, regardless of who is in possession of the information. This includes confidential supervisory information as defined above. It does not include information or documents that FHFA has disclosed under the Freedom of Information Act (5 U.S.C. 552; 12 CFR part 1202), or Privacy Act of 1974 (5 U.S.C. 552a; 12 CFR part 1204). It also does not include specific information or documents that were previously disclosed to the public at large or information or documents that are customarily furnished to the public at large in the course of the performance of official FHFA duties, including but not limited to: disclosures made by the Director pursuant to 24 CFR subpart F, and any FHFA successor rules; the annual report that FHFA submits to Congress pursuant to the Federal Housing Enterprises Financial Safety and Soundness Act of 1992 (12 U.S.C. 4501 et seq.), press releases, FHFA blank forms, and materials published in the Federal Register.

Person means individual or business entity.

§ 1214.2 Purpose and scope.

(a) Purpose. The purpose of this part is to control the dissemination of non-public information, which includes confidential supervisory information, and maintain its controlled, sensitive, privileged, or proprietary nature, as appropriate.

(b) Scope. This part imposes a broad-based prohibition against unauthorized disclosure of any non-public information. This part does not supersede the regulations at 12 CFR part 1202 (governing disclosure under the Freedom of Information Act); 12 CFR part 1204 (governing disclosure under the Privacy Act); and the sections describing permitted disclosures in any FHFA rules on Federal Home Loan Bank Information

Sharing or on the FHFA Public Use Database.

(c) These provisions also do not supersede or otherwise alter the rights or liabilities created by 5 U.S.C. 7211 (governing disclosures to Congress); 5 U.S.C. 2302(b)(8) (governing disclosures of illegality, waste, fraud, abuse, or public health or safety threats); or 12 U.S.C. 3401 (governing disclosure of financial institution customer information).

§ 1214.3 General rule.

(a) In general, Non-FHFA Employees. The Director makes available to each regulated entity a copy of FHFA's report of examination of that regulated entity. The report of examination and all other confidential supervisory information is the property of FHFA and is provided to the regulated entity for its confidential internal use only. Under no circumstance shall any person in possession or control of confidential supervisory information make public or disclose, in any manner, the confidential supervisory information, or any portion of the contents thereof, except as authorized in writing by the Director.

(b) In general, FHFA Employees. Except as authorized in writing by the Director, no FHFA employee in possession or control of non-public information may disclose or permit the use or disclosure of such information in any manner or for any purpose.

(c) Persons possessing confidential supervisory information. All confidential supervisory information, for which the Director authorizes disclosure, remains the property of FHFA and may not be used or disclosed for any purpose other than that authorized under this part without the prior written permission of the Director.

(d) No Waiver. FHFA's disclosure of non-public information to any person does

not constitute a waiver by FHFA of any privilege or FHFA's right to control, supervise, or impose limitations on, the subsequent use and disclosure of the non-public information.

(e) Penalties, Confidential Supervisory Information. Any person that discloses or uses confidential supervisory information except as authorized under this part may be subject to the penalties provided in 18 U.S.C. 641 and other applicable laws. In addition to those penalties, FHFA, regulated entity, Office of Finance, affiliate (as defined in 12 U.S.C. 4502(20)), or entity-affiliated party (as defined in 12 U.S.C. 4502(11)) employees may be subject to appropriate administrative, enforcement, or disciplinary proceedings.

(f) Penalties, Non-Public Information. Any FHFA employee that discloses or uses non-public information except as authorized under this part may be subject to the penalties provided in 18 U.S.C. 641, other applicable laws, and appropriate administrative, enforcement, or disciplinary proceedings.

§ 1214.4 Exceptions.

(a) FHFA Employees. Current FHFA employees may disclose or permit the disclosure of non-public information to another FHFA employee or regulated entity or the Office of Finance, when necessary and appropriate, for the performance of their official duties.

(b) Regulated Entity Agents and Consultants.—(1) When necessary and appropriate for regulated entity or Office of Finance business purposes, a regulated entity, the Office of Finance, or any director, officer, or employee thereof may disclose confidential supervisory information to any person currently engaged by the regulated entity or the Office of Finance, as officer, director, employee, attorney, auditor, or

independent auditor (“regulated entity agents”).

(2) A regulated entity, the Office of Finance, or a director, officer, employee, or agent thereof, also may disclose confidential supervisory information to a consultant under this paragraph if the consultant is under a written contract to provide services to the regulated entity or the Office of Finance and the consultant has agreed in writing:

(i) To abide by the prohibition on the disclosure of confidential supervisory information contained in this section; and

(ii) That it will not use the confidential supervisory information for any purposes other than those stated in its contract to provide services to the regulated entity or the Office of Finance.

(c) Law Enforcement Proceedings. Notwithstanding the general prohibition of disclosure of non-public information, to the minimum extent required by the Inspector General Act, Public Law 95–452, 92 Stat. 1101 (1978), FHFA’s Office of Inspector General is permitted under this section to disclose non-public FHFA information without Director approval.

(d) Privilege. FHFA retains all privilege claims for non-public information shared under § 1214.4, including, but not limited to attorney-client, attorney-work product, deliberative process, and examination privileges.

2013 _____
Edward J. DeMarco,
Acting Director, Federal Housing Finance Agency.

___ June 27,

Date

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